

March 14, 2014

RESS, EMAIL & COURIER

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

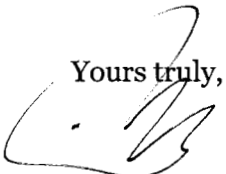
Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli

**Re: Jericho Wind, Inc. - Application for Leave to Construct (EB-2013-0361) -
Applicant's Reply Argument**

We are counsel to Jericho Wind, Inc. ("Jericho"), applicant in the above referenced proceeding. Further to Procedural Order #2 issued by the Board on January 27, 2014, please find enclosed the Applicant's Reply Argument. These submissions have been filed on RESS and served on all intervenors.

Yours truly,



Jonathan Myers

Tel 416.865.7532
jmyers@torys.com

cc: Mr. R. Groffman, Jericho
Mr. C. Keizer, Torys LLP
Intervenors

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Jericho Wind, Inc. for an Order or Orders pursuant to Section 92 of the *Ontario Energy Board Act*, 1998 (as amended) granting leave to construct transmission facilities in the Municipality of Lambton Shores, Lambton County and the Municipality of North Middlesex, Middlesex County, Ontario.

APPLICANT'S REPLY ARGUMENT

March 14, 2014

INTRODUCTION

1. These submissions are the reply argument of Jericho Wind, Inc. ("**Jericho**" or the "**Applicant**") in EB-2013-0361 (the "**Application**").
2. In accordance with Procedural Order No. 2, the Applicant filed its Argument-in-Chief on February 27, 2014. Intervenor submissions were received on March 5 and 6, 2014 from The Corporation of the County of Lambton ("**Lambton**") and The Corporation of the County of Middlesex ("**Middlesex**"), respectively. On March 6, 2014, Ontario Energy Board staff ("**Board Staff**") advised that they would not be filing submissions. Accordingly, this reply argument is in response to the submissions from Lambton and Middlesex.
3. In reply to the foregoing, Jericho submits that:
 - (a) Jericho's application is in the public interest pursuant to Section 96(1) of the *Ontario Energy Board Act* (the "**OEB Act**") and no party has opposed the issuance of leave to construct to Jericho;

- (b) Jericho has entered into a Road Use Agreement (an “**RUA**”) with Middlesex (the “**Middlesex RUA**”)¹ and has agreed to the terms of an RUA with Lambton staff which Lambton staff have endorsed and recommended for execution by Lambton (the “**Lambton staff endorsed RUA**”)². Both Middlesex and Lambton have, in their respective submissions, argued that the Board should impose conditions for approval that relate to these RUAs. Although an RUA is a convenient format to deal with various municipal approvals that are not within the Board’s jurisdiction and consents as to the location of electrical infrastructure that is within the Board’s jurisdiction, it is only the location of transmission infrastructure that is both within the Board’s jurisdiction and before the Board in this proceeding;
- (c) While the conditions of approval proposed by Lambton and Middlesex in their respective submissions reflect aspects of the RUAs that are beyond the Board’s jurisdiction in this proceeding and should therefore not be adopted in their entirety, those aspects of the Middlesex RUA and the Lambton staff endorsed RUA that relate to the specific location of Jericho’s proposed transmission infrastructure, namely Schedule “B” to each RUA, are entirely consistent with the location of the transmission facilities as set out in Jericho’s Application and evidence at Exhibits B-2-4 and B-2-5, as amended;
- (d) Given that the Board’s jurisdiction in this proceeding is solely in respect of the Applicant’s proposed transmission infrastructure and that no party opposes the Applicant’s proposed location for the transmission infrastructure, the following condition should form part of the Board’s order:

“that the approved transmission facilities be constructed in accordance with the specific route and construction parameters which exist in Schedule “B” of the Middlesex RUA, and in accordance with the specific route and construction parameters which exist in Schedule “B” of the

¹ The Middlesex RUA, dated November 12, 2013, was filed by Middlesex on February 27, 2014.

² The Lambton staff endorsed RUA was filed by Lambton on March 3, 2014.

Lambton staff endorsed RUA and in the evidence as shown in Exhibit B-2-4 and Exhibit B-2-5, as amended.”

This condition reflects those aspects of the RUAs that are within the Board’s jurisdiction and are acceptable to the Applicant, Lambton and Middlesex based upon the Middlesex RUA and the Lambton staff endorsed RUA that underpins the condition proposed by Lambton in its submissions;

- (e) Although Lambton argues that the Board should delay its consideration of the Application pending the outcome of a public comment period, such a delay would cause significant and material prejudice to the Applicant. Moreover, the acceptance of the foregoing condition by the Board provides a fair result that would not result in a delay for Jericho, while reflecting the position of all parties as to the location of the electrical infrastructure and permitting Lambton to carry out further consultation on the Lambton staff endorsed RUA aspects that are outside of the Board’s jurisdiction; and
- (f) On the basis of the above condition, the Board does not need to consider the scope of Section 41 of the *Electricity Act* and Section 92(1) of the *OEB Act* relative to the *Municipal Act* in order to grant leave to construct in the public interest. However, to the extent it chooses to do so, Jericho submits that Lambton and Middlesex have misinterpreted the scope of these provisions and their relationship to the *Municipal Act*.

4. Each of the foregoing submissions will be considered below in the context of the two distinct parts that make up the submissions of Lambton and Middlesex. The two distinct parts of the submissions of Middlesex and Lambton are: (1) the fact that they are each unopposed to the Application and have set out a condition to form part of the leave to construct order; and (2) a discussion of the role of an RUA and the *Municipal Act* in the context of the Board’s consideration under Section 92 of the *OEB Act* and the Applicant’s rights under Section 41 of the *Electricity Act*.

5. Each of the distinct parts will be considered in turn.

PART 1: LEAVE TO CONSTRUCT CONDITION

6. Subsection 96(1) of the *OEB Act* provides that where the Board is of the opinion that the construction of the proposed work is in the public interest, it shall make an order granting leave to carry out the work. The *OEB Act* makes explicit and prescribes the meaning of public interest with respect to granting leave. Subsection 96(2) narrows the scope of the public interest test for leave to construct by stating that the Board shall only consider the following with respect to the public interest:

1. the interests of consumers with respect to prices and the reliability and quality of electricity service; and
2. where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.

7. At Exhibit B-2-4, Figures 2, 3 and 4, Jericho filed detailed maps and plan and profile drawings. At Exhibit B-2-5, Figure 3, Jericho filed detailed drawings and illustrations for poles and structures. Jericho clearly set out specific routing, pole locations, safety measures and design parameters in the Application. These were amended on November 27, 2013. Through this evidence related to the location of the transmission infrastructure and related construction parameters, as well as evidence filed in support of cost responsibility and reliability, Jericho has demonstrated that the proposed transmission facilities will have no adverse impacts on the interests of consumers with respect to prices or the reliability or quality of electricity service, and that the proposed transmission facilities are consistent with the policies of the Government of Ontario regarding the promotion of the use of renewable energy sources. As such the project is in the public interest. It is important to note that no party has taken issue with the position that the project is in the public interest. In this regard, the application is unopposed.

8. Consistent with the Applicant's evidence, Middlesex and Jericho executed the Middlesex RUA on November 12, 2013. The Middlesex RUA was filed with the Board by Middlesex on February 27, 2014. Schedule "B" to the Middlesex RUA reflects the evidence filed by Jericho in the Application, as amended, in respect to the location of the transmission infrastructure and related construction parameters.

9. Jericho also worked toward reaching agreement on an RUA with Lambton. A proposed agreement, reflecting terms and conditions negotiated with Lambton staff, was endorsed publicly by the Lambton Public Works Department to the committee of the Lambton County Council which is responsible for Infrastructure & Development Services on January 15, 2014.³ After staff provided the committee with further information regarding the terms of the Lambton staff endorsed RUA, the proposed agreement was again endorsed publicly by the Lambton Public Works Department at a subsequent committee meeting on February 19, 2014.⁴ However, as noted in both Jericho's Argument-in-Chief and Lambton's submissions, an agreement has not yet been executed. The Lambton staff endorsed RUA was filed with the Board by Lambton on March 3, 2014. Schedule "B", parts B1-B7a, relate to the Jericho transmission infrastructure and are the same as Jericho's evidence in the Application, as amended.

10. As discussed in Part 2 below, there is no legislative or regulatory requirement for Jericho to enter into an RUA with either of Middlesex or Lambton. RUAs are a tool used by renewable energy developers and host municipalities to address a wide range of matters relating to the development of a project through the convenience of a single agreement. Some of these matters, such as the location of electrical infrastructure, are within the Board's jurisdiction, while others are not.

11. Typically, an RUA will address issues relating to (1) the location of transmission facilities within public road allowances, (2) the location of distribution facilities within public road allowances, and (3) the issuance of municipal permits for certain aspects of a renewable energy project, such as with respect to the transport of oversized loads (namely turbine components) along municipal roads and entrance permits to allow for the use of access roads to

³ See Staff Report to Committee A.M. Chair and Members re Jericho Wind, Inc. Road Use Agreement, January 15, 2014, which recommends execution of the Lambton staff endorsed RUA. The Staff Report is available at <https://lambton.civicweb.net/FileStorage/62002B70636A412FB7E985986D177AD3-PW%20Report%20-%20NextEra%20Road%20Use%20Agreementl.pdf>

⁴ See Staff Report to Committee A.M. Chair and Members re Jericho Wind, Inc. Road Use Agreement, February 19, 2014, which contains a similar recommendation as the January 15 report and states in its conclusion: "The Draft Road Use Agreement between The Corporation of the County of Lambton and Jericho Wind, Inc. addresses the concerns brought forward by County staff regarding the placement of transmission lines . . . for the Jericho Wind Energy Centre." The Staff Report is available at <https://lambton.civicweb.net/FileStorage/D7E26F23EEB3499A9FEEA4819EDF9B7B-PW%20Report%20-%20NextEra%20Road%20Use%20Agreement%20Update%20FINA.pdf>

support construction. Aspects (1) and (2) relate to consents to matters under OEB jurisdiction with respect to routing and location of electrical infrastructure, whereas aspect (3) falls under municipal jurisdiction. Aspect (1), the location of the electrical transmission infrastructure, is the only aspect of the RUAs that is before the Board in this Application.

12. In particular, it is the sections of the RUAs that set out the agreed-upon locations of the transmission facilities within the County road allowances that are relevant to the Board's jurisdiction in the present Application. In each of the Middlesex RUA and the Lambton staff endorsed RUA, the location of the transmission facilities within the County road allowances and related construction parameters are identical to the transmission facilities as set out in Jericho's Application, as amended.

13. Accordingly, Jericho and Middlesex are in agreement as to the appropriate locations for the proposed transmission facilities in Middlesex's road allowances. Lambton has not opposed the location for the proposed transmission facilities in its road allowances in this proceeding.

14. Middlesex and Lambton take the position that leave to construct should be granted conditional upon the requirement that Jericho construct the transmission facilities in accordance with the locations for the transmission facilities and construction parameters as reflected in each of the Middlesex RUA and the Lambton staff endorsed RUA.

15. Middlesex proposes the following condition:

“approval of leave to construct, . . . , is conditional upon the Board approving the specified route and construction parameters (mitigation measures) which exist in schedule “B” of the Agreement and the need for the Applicant to follow the County's by-law process by obtaining all necessary permits, or provided for in S.7(e) and Schedule “D” of the Agreement.”

16. With respect to this condition, Jericho and Middlesex are of one mind with respect to the construction of the project in accordance with the specific route and construction parameters in Schedule “B” to the Middlesex RUA and Jericho accepts that aspect as a condition to the leave to construct. However, Section 7(e) and Schedule “D” referenced above relate to aspects that are outside of the Board's jurisdiction. However, typically applicants are required as part of an order

to comply with all laws and to obtain all required permits. As such, the reference to section 7(e) and Schedule “D” would form part of that more general condition and is therefore unnecessary.

17. Lambton has requested that the proceeding should be adjourned or, in the event there is no adjournment, that the Board approve the Application subject to it imposing conditions equivalent to all terms contained within the Lambton staff endorsed RUA on the grounds that the Lambton staff endorsed RUA establishes locations for infrastructure which have been reviewed by professional engineers and consider both public safety and the needs and presence of other utilities.⁵

18. Dealing first with Lambton’s proposed condition, as noted the Lambton staff endorsed RUA deals with a combination of Board regulated transmission infrastructure and other aspects that are either not within the Board’s jurisdiction or are within the Board’s jurisdiction but not currently before the Board (i.e. location of distribution facilities).

19. Those aspects related to the transmission infrastructure are set out at Schedule “B” of the Lambton staff endorsed RUA and are identical to Jericho’s evidence, as amended. The Board can only approve a matter which it is authorized by statute to approve. In this case, it is the transmission infrastructure location and related construction parameters. Therefore, excluding those aspects of the Lambton staff endorsed RUA (and in turn those aspects of the condition of approval proposed by Lambton) that are either outside the Board’s jurisdiction or not currently before the Board, the condition proposed by Lambton aligns with that proposed by Middlesex and is in accordance with Jericho’s evidence. As a result, each of Jericho, Middlesex and Lambton are aligned on the electrical transmission infrastructure and associated construction parameters.

20. Based on the foregoing, in accordance with the submissions of Middlesex and Lambton, Jericho agrees with an approval of the leave to construct with a condition requiring the facilities to be constructed in accordance with the specific route and construction parameters which exist in Schedule “B” of the Middlesex RUA, and in accordance with the specific route and

⁵ Lambton Submissions, para 15.

construction parameters which exist in Schedule “B” of the Lambton staff endorsed RUA and in the evidence as shown in Exhibit B-2-4 and Exhibit B-2-5, as amended.

21. With respect to Lambton’s adjournment request, the Board should not grant the adjournment requested by Lambton for the following reasons:

- (a) a delay would cause significant and material prejudice to Jericho. In particular, a delay in the granting of leave to construct so as to accommodate Lambton’s adjournment request would delay the construction and commissioning of Jericho’s transmission facilities, which would have the effect of delaying Jericho’s ability to put its generation facility into commercial operation. Such delays would have significant adverse impacts on Jericho’s construction costs as well as significant adverse impacts to Jericho under the terms of its Feed-in Tariff contract with the Ontario Power Authority. These impacts, and the corresponding prejudice to Jericho, would result from a delay until the Lambton Council meeting in June 2014 and would be exacerbated by any additional time following the meeting which would be necessary to complete this proceeding to the point of a Board decision, which additional time we estimate could bring the total delay to perhaps six months or more. There is also uncertainty as to whether the council would deal with the matter at the June meeting;
- (b) there is no statutory requirement for Jericho to enter into an RUA as part of a leave to construct and the review process commenced by Lambton Council is outside of this process and not determinative of the leave to construct;
- (c) the project, including the transmission infrastructure, has been subject to a public stakeholder process and a public proceeding. Public input has been received and is before the Board in evidence. Lambton is not prejudiced from seeking public input on other aspects of the Lambton staff endorsed RUA unrelated to the leave to construct; and
- (d) Lambton has not raised any issues to suggest the project is not in the public interest and is prepared to accept the location and technical aspects of the

transmission infrastructure in accordance with Schedule “B” of the Lambton staff endorsed RUA and the evidence as part of an order of the Board.

22. Jericho submits that the condition of approval proposed above is a fair and proper condition since it reflects a mutually acceptable condition for the location and construction parameters of the transmission line; is consistent with the evidence; avoids undue delay and prejudice to Jericho; and permits Lambton to proceed with its public review of the non-transmission aspects of the Lambton staff endorsed RUA.

23. Much of the discussion in the submissions of Middlesex and Lambton relates to the relationship between the *OEB Act*, Section 41 of *Electricity Act* and the *Municipal Act*. Based upon Jericho’s evidence as a whole establishing the public interest, the fact no party has opposed the project and, in particular, the mutually acceptable condition of approval set out above, for purposes of granting Jericho leave to construct there is no need for the Board to consider the jurisdictional issues raised by Middlesex and Lambton with respect to Section 41. However, if the Board chooses to do so, Jericho’s submissions in this regard are set out in Part 2.

PART 2: JURISDICTIONAL ISSUES

24. Jericho indicated in its Argument-in-Chief that, in respect of the portions of the Transmission Line routing that will be situated within county road allowances, it is relying on the rights it has under Section 41 of the *Electricity Act* and that the Board’s consideration of the public interest under Sections 92 and 96 of the *OEB Act* in respect of this routing is subject to those rights.

25. In response to Jericho’s submissions on this point, Lambton and Middlesex filed extensive submissions concerning a wide range of jurisdictional matters relating to the relationship between the *OEB Act*, Section 41 of the *Electricity Act* and the *Municipal Act*, as well as the scope of the public interest test on an application for leave to construct.

26. Based on the Applicant’s submissions in Part 1 of this Reply Argument, it is not necessary for the Board to consider the scope of Section 41 of the *Electricity Act* or to address the lengthy submissions on jurisdictional matters from each of the counties in order to grant

leave to construct in the public interest. Nevertheless, should the Board choose to consider these issues, it is Jericho's submission that Lambton and Middlesex have misinterpreted each of these jurisdictional matters. In particular, as discussed in the sections below, it is the Applicant's submission that:

- the *Electricity Act* and the *OEB Act* establish a complete regulatory scheme, over which the Board has jurisdiction, concerning the location of transmission facilities in public highways and the Board cannot delegate its authority to the counties in this regard;
- there is no requirement for Jericho to enter into an RUA with either county;
- there is no requirement for the Board to approve any road use agreement offered by or entered into by Jericho with either county;
- the counties' jurisdiction over public highways within their respective jurisdiction is not absolute but, rather, is expressly limited under the *Municipal Act*;
- the counties' jurisdiction over the location of public utilities in their highways expressly excludes the authority to regulate electricity transmission and distribution systems;
- Section 41 of the *Electricity Act* does not eliminate the Board's authority to approve the location of transmission infrastructure in the road allowances - this authority is exercised pursuant to Section 92 of the *OEB Act*; and
- the scope of the public interest test under Section 96 of the *OEB Act* is narrow and does not require or permit the Board to consider provincial government policy generally or to consider potential impacts on reliability or quality of electricity service other than insofar as it may affect electricity consumers.

Rights Granted to Transmitters Under Section 41 of the *Electricity Act*

27. The rights granted to electricity transmitters pursuant to Section 41 of the *Electricity Act* are described beginning at paragraph 14 of the Applicant's Argument-in-Chief. In summary, Section 41 provides transmitters and distributors with significant and exclusive rights with respect to the construction of electricity transmission and distribution systems under, over or on any public street or highway. Under subsection 2(1) of the *Electricity Act*, a transmitter means "a person who owns or operates a transmission system". As Jericho will own and operate a transmission system, it is therefore a transmitter for purposes of Section 41 of the *Electricity Act*.

28. Subsection 41(1) of the *Electricity Act* provides that a transmitter may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities *as it considers necessary* for the purpose of its transmission system, including poles and lines. Subsection (2) provides that a transmitter may inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities constructed or installed under subsection (1), and subsections (3) and (4) grant rights of entry for transmitters and their employees and agents. Subsection (5) provides that the exercise of such powers by a transmitter *does not require the consent of the owner of or any other person having an interest in the street or highway*. Subsection (8) provides that other than providing compensation for damages, a transmitter is not required to pay any compensation to exercise its powers under this section.

Board Has Complete Jurisdiction to Determine Location of Transmission Lines in Public Roads and Cannot Delegate this Authority

29. Much of the confusion on the part of Middlesex and Lambton concerns the significance of Subsections 41(9) and (10), which state as follows:

Location

(9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.

Application of subs. (9)

(10) Subsection (9) does not apply if section 92 of the *Ontario Energy Board Act, 1998* applies.

30. As a result of Jericho's transmission line being the subject of a leave to construct proceeding under Section 92 of the *OEB Act*, it is clear from Subsection 41(10) that Subsection 41(9) of the *Electricity Act* is not applicable to the proposed transmission facilities. The significance of this is twofold. First, there is no requirement for Jericho to reach agreement with either of the counties, being the owners of the relevant roads, as to the location of any structures, equipment or facilities that Jericho plans to construct or install in such roads. Second, in the event that Jericho is unable to reach agreement with the owners of the road as to the location of the facilities within the roads, there is no requirement for Jericho to apply to the

Board pursuant to Section 41(9) of the *Electricity Act* for a determination as to the location of such facilities. Rather, the effect of Subsection 41(10) is that the location of the transmission facilities within the road allowances is subject to approval by the Board pursuant to the Board's authority for granting leave to construct under Section 92 of the *OEB Act*.⁶ The application of Section 92 of the *OEB Act* does not diminish Jericho's rights to be in the road allowance. Subsection 41(10) only applies in respect of Subsection 41(9). All of the rights provided to the Applicant under Subsections 41(1) - (8) continue to exist and apply.

No Requirement for Jericho to Enter Into or Receive Approval for Road Use Agreements

31. Section 97 of the *OEB Act* provides that, in an application under Section 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board. Contrary to the suggestions made by Middlesex⁷, an RUA is not an agreement which is required or for which approval of the Board is required under Section 97 of the *OEB Act*. In this regard, there are several aspects of Section 97 and its relationship to Section 41 of the *Electricity Act* that are worth noting.

32. First is that Section 97 does not require an Applicant to have entered into an agreement with an affected landowner. Rather, it contemplates that agreements may in future be offered to an affected landowner.

33. Second, where an agreement has been reached with a landowner, Section 97 does not require the final executed agreement with that landowner to have been approved by the Board. Rather, it is only the form of agreement that must be approved by the Board. A form of agreement will be subject to negotiation with an affected landowner and the Board, in routinely approving leave to construct applications without final executed land agreements, recognizes that

⁶ The Board's determination of the location of the transmission facilities within the road allowances under Section 92 of the *OEB Act* may be guided by the approach the Board has taken in recent proceedings under Section 41 of the *Electricity Act* in respect of collection/distribution lines that are situated in road allowances. See Decision and Order in EB-2010-0253, January 12, 2011.

⁷ Middlesex Submissions, paras. 13 and 28.

final agreements will not necessarily be consistent with the approved form of the relevant agreement.⁸

34. Third, Section 97 contemplates that the form of agreement requiring approval of the Board will be one which is entered into *for the purposes of acquiring interests in land* that the Applicant requires from a landowner in connection with the transmission facilities for which it seeks leave to construct. Section 41 of the *Electricity Act* already grants to Jericho the rights it requires to construct, operate and maintain transmission facilities in the road allowances without need for consent from the owners of such road allowances, as well as all necessary rights of access to same. Section 97 of the *OEB Act* cannot take away the rights granted by Section 41 of the *Electricity Act*.

35. Moreover, as will be discussed below, under the *Municipal Act*, a municipality's ownership of a public highway is not absolute and is subject to any interests in the land held by any other persons, including, in our submission, the interests granted to transmitters under Section 41 of the *Electricity Act*. As such, there is no need for Jericho to acquire interests in land from the counties under an agreement, the form of which would require approval pursuant to Section 97. Indeed, despite the wide range of purposes for entering into an RUA, these purposes do not include the conveyance of interests in lands comprising the road allowances from the counties to Jericho.

County Authority Over Roads is Not Absolute

36. As a 'creature of statute', a municipality (including an upper tier municipality such as a county) can only act within the powers conferred on it by the Ontario legislature. For the purposes of these submissions, the most relevant powers conferred on Lambton and Middlesex are those established under the *Municipal Act*.

37. Part II of the *Municipal Act* sets out the general powers of a municipality, which includes the authority to pass by-laws relating to, amongst other things, public utilities and highways.⁹ Notably, a by-law may provide for a system of licenses, permits, approvals and authorizations.¹⁰

⁸ Ontario Energy Board, Decision and Order in EB-2006-0305, June 1, 2007, p. 10.

38. A municipality's powers in the areas over which it has been given jurisdiction are not absolute. An important limitation on a municipality's authority is established under Subsection 14(1) of the *Municipal Act*, which provides that a municipal by-law "is without effect to the extent of any conflict with a provincial or federal act or a regulation made under such an act, or an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal act or regulation." Subsection 14(2) clarifies that there will be a conflict between a by-law of a municipality and an act, regulation or instrument of a legislative nature in circumstances where the by-law frustrates the purpose of the act, regulation or legislative instrument.

39. Part III of the *Municipal Act* sets out various specific powers of a municipality. Two specific municipal powers are relevant to this discussion. First is the authority to pass by-laws in respect of highways over which it has jurisdiction.¹¹ The *Municipal Act* clarifies that a highway is deemed to be owned by the municipality that has jurisdiction over it. However, a municipality's ownership of a highway is not absolute and is subject to any rights reserved by a person who dedicated the highway or *any interest in the land held by any other person*.¹² As noted above, this limitation on a municipality's ownership of a public highway is subject to the interests that an electricity transmitter has in a road pursuant to the statutory rights granted under Section 41 of the *Electricity Act*.

County Authority Over Location of Public Utilities in Roads Does Not Apply to Electricity Transmission or Distribution Facilities

40. Part III of the *Municipal Act* also provides specific powers to a municipality in respect of public utilities. However, these powers are limited and do not extend to electrical transmission or distribution infrastructure because these activities are explicitly excluded from the definition of "public utility" in the *Municipal Act*.

⁹ *Municipal Act*, s. 11(3).

¹⁰ *Municipal Act*, s. 8(3).

¹¹ *Municipal Act*, s. 27.

¹² *Municipal Act*, s. 30 (emphasis added).

41. Section 78 of the *Municipal Act* provides that a municipality has specific powers for purposes of providing “public utilities”, including powers to enter highways to construct and maintain pipes, wires, poles and other facilities. Of particular note is Subsection 78(3) of the *Municipal Act*, which provides that nothing in Section 78 prevents a body that owns a highway from regulating the activities described in Subsections 78(1) and 78(2) in relation to public utilities on its highway in a reasonable manner, including with respect to notice, timing and coordination of the activities and the requirement to obtain a permit before engaging in the activities.

42. However, the extent of this power to regulate the activities of public utilities on highways owned by a municipality is clearly limited by the scope of the term “public utility” as defined in the *Municipal Act*, which expressly *excludes* electricity-related systems.¹³ As such, the *Municipal Act* is clear that a municipality that is the owner of a highway does not have authority to regulate the installation, construction or maintenance of electricity-related systems on its highway. This aspect of regulation falls squarely under Section 41 of the *Electricity Act* and Section 92 of the *OEB Act*.

Further Limitations on Municipal Jurisdiction Over Electricity Infrastructure Evidence Overall Scheme of *Municipal Act*

43. The fact that the powers granted to municipalities under the *Municipal Act* are not applicable to the regulation of electricity-related systems is further demonstrated and reinforced by other provisions of the *Municipal Act*. For example, Section 135 of the *Municipal Act* provides that a municipality may prohibit or regulate the destruction or injuring of trees. However, Subsection 135(12) provides that a by-law made under Section 135 does not apply to

the injuring or destruction of trees by a transmitter or distributor, as those terms are defined in section 2 of the *Electricity Act* for the purpose of constructing and maintaining a transmission system or a distribution system, as those terms are defined in that section.

¹³ *Municipal Act*, s. 1(1).

44. Likewise, under Section 142 of the *Municipal Act*, a municipality may prohibit or regulate the placing of fill, removal of topsoil or alteration of the grade of land. However, Subsection 142(5)(d) provides that a by-law made under this section does not apply to

the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken by a transmitter or distributor, as those terms are defined in section 2 of the *Electricity Act* for the purpose of constructing and maintaining a transmission system or a distribution system, as those terms are defined in that section.

45. Also consistent with this regulatory framework is Section 9 of Ontario Regulation 584/06 under the *Municipal Act*, which provides that a municipality does not have the power to impose a fee or charge on a transmitter, as defined in Section 2 of the *Electricity Act*, for services or activities, costs payable or the use of property with respect to wires, cables, poles, conduits, pipes, equipment, machinery or other works that are or will be located on a municipal highway and that are or will be used as part of the business of the transmitter.

Summary of the Relationship Between Section 41, the *Municipal Act* and Board Authority Under the *OEB Act*

46. While a municipality's powers to establish by-laws and to regulate public highways and the placement of public utility infrastructure within its highways are broad, the *Municipal Act* clearly and consistently excludes from a municipality's powers the ability to regulate such matters in relation to the construction, operation and maintenance of electricity transmission and distribution systems. This 'carve out' from municipal jurisdiction is consistent with the regulatory framework established under the *Electricity Act* and the *OEB Act*, which together establish a complete regulatory scheme governing the construction, operation and maintenance of transmission and distribution infrastructure on public road allowances.

47. As explained above, within the scheme established under the *Electricity Act* and the *OEB Act*, for a low voltage distribution line a distributor must reach agreement with the owner of the road as to location of distribution facilities within the road allowance or else must apply under Section 41(9) of the *Electricity Act* for the Board's determination. For a high voltage transmission line, such as that which is the subject of the present Application, the Board will determine the location of the line in the context of considering an application for leave to

construct under Section 92 of the *OEB Act*. While municipalities may regulate other aspects in relation to their roads pursuant to the by-laws they have enacted under the authority of the *Municipal Act*, to the extent that any such by-laws conflict with or frustrate the purposes of the *Electricity Act* or the *OEB Act* those by-laws and any requirements thereunder that a municipality purports to impose on an electricity transmitter or distributor will be invalid.

48. This understanding of the relationship between the powers established under the *Municipal Act* and those of the Board are consistent with and reinforced by Section 128 of the *OEB Act*, which provides as follows:

Conflict with other legislation

128. (1) In the event of conflict between this Act and any other general or special Act, this Act prevails.

Same

(2) This Act and the regulations prevail over any by-law passed by a municipality.

As such, the Board's authority to grant leave to construct under Section 92 of the *OEB Act* and its authority to grant leave for crossings under Section 101 of the *OEB Act* prevail over any powers granted to a municipality under the *Municipal Act*. To hold otherwise would frustrate the purposes and intent of the *Electricity Act* and the *OEB Act* regarding the construction of transmission facilities for purposes of connecting renewable energy sources.

Scope of the Public Interest Test Under Section 96

49. Jericho has demonstrated that the proposed transmission facilities will have no adverse impacts on the interests of consumers with respect to prices, reliability or the quality of electricity service, and that the proposed transmission facilities are consistent with the policies of the Government of Ontario regarding the promotion of the use of renewable energy sources. As noted above, no party has taken issue with the Applicant's position that the project is in the public interest. In this regard, the application is unopposed. However, Lambton and Middlesex have made submissions in respect of the public interest definition and its application.

Public Interest Test Does Not Preclude Consideration of Transmission Line Location

50. In its submissions, Lambton does not raise any concerns with respect to impacts of the proposed transmission facilities on the interests of consumers with respect to prices, reliability or quality of electricity service and does not dispute that the proposed transmission facilities are consistent with the policies of the Government of Ontario with respect to the promotion of the use of renewable energy sources.

51. Lambton does, however, raise two arguments in respect of the scope of the public interest test under Section 96 of the *OEB Act*. First, Lambton argues that Jericho's interpretation of the public interest test results in the Board having little to no power to make a substantive ruling regarding the placement of electrical infrastructure in road allowances in the context of the Application.¹⁴ This is both incorrect and a misstatement of Jericho's interpretation of the scope of the test. The focus of the Applicant's submissions in its Argument-in-Chief regarding Section 41 was to clarify that the question for the Board is only with respect to where in the road allowance the Transmission Line should be located and not whether Jericho has a right to place its infrastructure in the road allowance.¹⁵

Public Interest Test Does Not Permit Consideration of Government Policies Generally

52. Second, Lambton argues that Jericho has improperly defined the public interest to include only those factors identified by the test in Section 96 of the *OEB Act*.¹⁶ Lambton argues instead that the Board should consider the public interest more broadly so as to include the interests of the County as a local government and all manner of policies of the Government of Ontario.¹⁷ However, this is simply not consistent with a plain reading of the scope of the limited public interest test articulated in Subsection 96(2) of the *OEB Act*. The statute explicitly defines and limits the broad public interest consideration that the Board typically applies. Moreover, in respect of the scope of the public interest test on an application for leave to construct, the Board has previously stated that "while it may be appropriate to consider the concept of public interest

¹⁴ Lambton Submissions, para. 6.

¹⁵ Applicant Argument-in-Chief, para. 18.

¹⁶ Lambton Submissions, para 17.

¹⁷ Lambton Submissions, paras. 16-17.

from a broader perspective in other contexts, the (OEB) Act clearly limits the factors the Board is to consider in the context of (leave to construct) Applications”.¹⁸

53. Middlesex argues similarly that the meaning of Subsection 96(2)2 of the *OEB Act* is that “in the event a renewable energy source is promoted as a result of leave to construct being granted by the Board pursuant to a Section 92 application, such promotion can only occur if the construction, expansion or reinforcement of the transmission line or the making of the connection is in the public interest as being consistent with the policies of the Government of Ontario”.¹⁹

54. In the Applicant’s submission, Middlesex’s interpretation of this aspect of the public interest test is incorrect. Rather, the Board is required to consider whether the proposed transmission facilities will promote the use of renewable energy sources, consistent with the policies of the Government of Ontario in relation to the use of renewable energy sources. Such a reading is consistent with the objectives of the Board under Subsection 1(1)5 of the *OEB Act*, which makes it the objective of the Board “to promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.”

55. Subsection 96(2)2 does not impose on the Board an obligation to consider all manner of provincial government policies in the course of considering an application for leave to construct. Such an interpretation would be at odds with the framework of Section 96, which establishes a narrow and expressly limited public interest test. Furthermore, an adjudication of general government policies would exceed the Board’s jurisdiction.

Consideration of Reliability and Electricity Service Impacts is from Consumer Perspective

56. Although Middlesex has not taken the position that the project is not in the public interest, it nevertheless argues that there are potential risks to electrical infrastructure located within road allowances as a result of the proximity to vehicular traffic and that these potential

¹⁸ See Ontario Energy Board, Decision and Order in EB-2013-0040/0041, November 12, 2013, pp. 4-5.

¹⁹ Middlesex Submissions, para 21.

risks could affect the reliability and quality of electricity service.²⁰ On this basis, Middlesex argues that the Board should require the Applicant to have entered into an RUA with the County as a means of ensuring such potential risks have been adequately addressed. This interpretation is incorrect because, as stated in Subsection 96(2)1 of the *OEB Act*, the Board's consideration of reliability and quality of electricity service is from the perspective of the interests of consumers. The *Electricity Act* defines "consumer" to mean a person who uses, for the person's own consumption, electricity that the person did not generate.

57. The proposed transmission facilities will not directly serve any "consumers" - they will be used only to convey electricity from the Applicant's wind generation facility to the Hydro One transmission system which forms part of the IESO-controlled grid. As such, the Board's consideration of potential impacts on reliability or quality of electricity service for consumers will relate to those consumers that are served directly or indirectly by the Hydro One system to which the proposed transmission facilities will connect. It is for this reason that the Board looks to the Customer Impact Assessment ("CIA") from Hydro One and the System Impact Assessment ("SIA") from the IESO as the primary basis for its determination as to whether the proposed facilities will have any adverse impacts on reliability or quality of service for consumers. As indicated in the Applicant's Argument-in-Chief, the CIA and SIA each confirm that the facilities can be connected without adversely affecting the reliability or quality of electricity service for consumers.²¹

58. It is important to note that the construction of a transmission line that is safe includes not only the construction of a safe electrical connection, but also construction of the facility in a manner that assures public safety. In this regard, Jericho will construct the transmission line in accordance with applicable laws, codes and standards. This relates not only to the nature and size of the poles and conductors that will be used, but also to any the barriers or protections that may be required to ensure appropriate separation between the public and the electrical infrastructure (e.g., guide rails in respect of transmission facilities that are located along roads). This aspect is contemplated under Section 41 of the *Electricity Act*, wherein it states that a

²⁰ Middlesex Submissions, paras. 17-19.

²¹ Applicant Argument-in-Chief, paras. 23 and 24.

transmitter may “construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system”. Safety is a fundamental responsibility of any transmitter and is part of the Board’s jurisdiction to consider.

59. In any event, Middlesex agrees as to the road safety measures as demonstrated through its agreement in the Middlesex RUA as to the location of the transmission facilities and the design and location of associated road safety measures (e.g., guide rails). Likewise, the location of transmission facilities and the design and location of associated road safety measures were agreed to by Lambton staff, following review by professional engineers, as confirmed by the Lambton staff endorsed RUA.²² As such, there is no dispute as to whether the proposed transmission facilities will comply with applicable road safety standards.

60. In its submissions, Middlesex notes that in Procedural Order No. 8 in EB-2013-0040/EB-2013-0041 the Board stated that “matters relating to road safety for county roads are generally under the authority of the County.”²³ This combined proceeding considered applications by Jericho affiliates for leave to construct transmission facilities associated with the Bornish Wind Energy Centre and the Adelaide Wind Energy Centre and which were described in the present Application.²⁴ In that proceeding, the statement by the Board was made in the context of a procedural order issued for the purposes of scheduling an oral hearing and no analysis or discussion concerning this issue was provided in the Procedural Order beyond the referenced statement. Notably, the Board made the statement without having requested or otherwise received or considered any submissions from the Applicants in that proceeding as to the jurisdiction over road safety as it relates to the location of transmission infrastructure on road allowances. The issue was not placed before the Board at any time as an agreement was thereafter reached with Middlesex and a written hearing was conducted on an unrelated and narrow set of issues. Accordingly, having regard to the circumstances in which the Board made the statement and the detailed submissions on jurisdiction made herein, Jericho submits that the Board in the present proceeding should give no weight to the referenced statement.

²² Lambton Submissions, para. 15.

²³ Middlesex County Submissions, para. 8.

²⁴ See Exhibit B, Tab 1, Schedule 1, p. 3.

61. In any event, while Middlesex proposes a more expansive definition of the public interest that should be considered by the Board, Middlesex concludes that the project meets its view of the public interest.²⁵

CONCLUSION

62. The proposed transmission facilities are in the public interest in accordance with Subsection 96(1) of the *OEB Act* and no party has opposed the granting of leave to construct to Jericho. The proposed transmission facilities will not affect the interests of consumers with respect to prices because they will be paid for entirely by the Applicant. As demonstrated by the CIA and SIA filed by the Applicant, the proposed transmission facilities will not adversely impact the interests of consumers with respect to the reliability or quality of electricity service. Moreover, the proposed facilities are consistent with the policies of the Government of Ontario with respect to the promotion of the use of renewable energy sources.

63. No party has opposed the Applicant's requests for approval of the forms of land agreements included in Exhibit F-4-1 of the pre-filed evidence or for approval pursuant to Section 101 of the *OEB Act* for authority to construct portions of the transmission facilities upon, under or over a highway, utility line or ditch.

64. The proposed routing and locations for the transmission facilities are appropriate. No party has opposed the location of the transmission infrastructure on the basis of a condition, acceptable to Jericho as well as to Middlesex and Lambton, that the approved transmission facilities be constructed in accordance with the specific route and construction parameters which exist in Schedule "B" in each of the Middlesex RUA and the Lambton staff endorsed RUA, as well as the evidence filed in Exhibit B-2-4 and Exhibit B-2-5, as amended. Acceptance of this condition provides a fair result that reflects the positions of all parties as to the location of the transmission infrastructure, while permitting Lambton to carry out further consultation on aspects of the Lambton staff endorsed RUA that are outside of the Board's jurisdiction. As such, the Board should reject Lambton's request for an adjournment or other such delay.

²⁵ Middlesex Submissions, paras. 3 and 26.

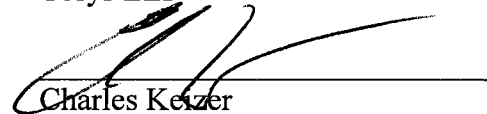
65. Accordingly, for the reasons set out herein, we respectfully request that the Board grant leave to construct to the Applicant in respect of the proposed transmission facilities pursuant to Section 92 of the *OEB Act*, along with such other relief as requested in the Application.

All of which is respectfully submitted this 14th day of March, 2014.

JERICO WIND, INC.

By its counsel

Torys LLP



Charles Keizer